BRIEF FOR PETITIONERS MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 21183

SOUTHWESTERN CABLE CO.,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

Case No. 21192

MISSION CABLE TV, INC.,
PACIFIC VIDEO CABLE CO.,
and
TRANS-VIDEO CORP.,
Petitioners,

v.

UNITED STATES OF AMERICA
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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JURISDICTIONAL STATEMENT

The petition for review was filed under the provisions of Section 402 (a) of The Communications Act of 1934, as amended, 66 STAT. 718 (1952), 47 U.S.C.A. § 402(a) (1962) and under Sections 2 and 3 of the Judicial Review Act of 1950, 64 STAT. 1129, 1130 (1950), 5 U.S.C.A. § § 1032, 1033 (Supp. 1961). Review is sought of the Memorandum Opinion and Order of the Federal Communications Commission, released July 25, 1966, identified as FCC 66-683 and Docket No. 16786 and as corrected on July 26, 1966. *Midwest Television, Inc. (KFMB-TV)*, 4 F.C.C.2d 612 (1966). (R. 577-598). [1]

Petitioners, Mission Cable TV, Inc. and Pacific Video Cable Co., are California corporations, doing business in California with their principal offices located in El Cajon, California. Trans-Video Corp. is a Delaware corporation, doing business in California with its principal offices located in El Cajon, California. Petitioners are persons aggrieved within the meaning of Section 4 of the Judicial Review Act of 1950, since the order of the Commission is a final order prohibiting them from conducting their business for an undetermined period of time, within certain areas of the City of San Diego, California, and the County of San Diego, California, where they otherwise are authorized and legally empowered to do so. Venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit by Section 3 of the Judicial Review Act of 1950, 5 U.S.C.A. § 1033 (Supp. 1961).

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[1] References are to the page number of the Record as certified to this Court by the Commission under date of August 26, 1966.

STATEMENT OF THE CASE

Petitioners, Mission Cable TV, Inc., and Pacific Video Cable Co., are the owners of community antenna television systems (CATV) [2] in the San Diego, California, area. Petitioner, Trans-Video Corp., is the majority owner of Mission Cable TV, Inc., and the sole owner of Pacific Video Cable Co. In addition, Trans-Video Corp. is the operator of the systems owned by Mission and Pacific. Mission and Pacific began operating prior to February 15, 1966, under authority of franchises issued by the Cities of San Diego, Chula Vista, La Mesa, El Cajon and the County of San Diego.

On April 23, 1965, the Commission issued its First Report and Order in Dockets No. 14895 and 15233 (30 F.R. 6038; 38 F.C.C. 683; 4 Pike & Fischer, R.R.2d 1725) in which it adopted rules covering the operations of common-carrier microwave stations to relay signals to CATV systems. These rules, in reality, apply to and control the operation of CATV systems which [3] receive signals via microwave. At the same time, the Commission issued a Notice of Inquiry and Proposed Rule-Making in Docket No. 15971 (30 F.R. 6078; 4 Pike & Fischer, R.R.2d 1679) concerning the adoption of rules to control the operation of all CATV systems.

On February 15, 1966, the Commission issued a press release announcing that it planned to adopt new rules to regulate all CATV systems. These rules were not adopted until March 4, 1966, and not released to the public until March 8, 1966. They were published in the

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[2] A CATV system is an enterprise which receives television signals transmitted by television broadcast stations (either directly off-the-air or by means of a radio microwave relay), amplifies these signals and distributes them through a system of cables to subscribers who pay a charge for this service. In this case, Petitioners' systems use off-the-air pickups only.

[3] See, *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied*, 375 U.S. 951 (1963).

Federal Register on March 17, 1966, as the Second Report and Order in Dockets 14895, 15233 and 15791 (31 F.R. 4540; 2 F.C.C.2d 725; 6 Pike & Fischer, R.R.2d 1717). In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which received signals directly off-the-air from television broadcast stations. In essence, the new rules are purportedly designed to protect and foster the development of local UHF television broadcast service. The Commission was concerned that the increased variety of signals available on CATV systems might reduce the available audience and revenues for local television broadcast stations by "fragmentation" of audience. To prevent this purported evil, the new rules provide that CATV systems must carry local stations and nearby stations in accordance with a system of priorities based upon signal strength. They also provide that a local television station may prevent the CATV system from carrying on the same day the signal of a non-local station which duplicates the programs of the local station. In addition, the new rules provide that no CATV system in the top 100 markets, as defined by ARB,[4] may extend any "distant signal" beyond the Grade B contour of the originating station without Commission approval after a hearing. Finally, the rules provide that the Commission may impose other limitations upon CATV systems if required to protect the "public interest."

The rule prohibiting carriage of distant signals was made effective on February 15, 1966 (the date of a press release), despite the fact that these rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. CATV systems in operation and delivering distant signals on February 15, 1966, were accorded

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[4] The American Research Bureau is a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits.

"grandfather" rights and were permitted to continue carriage of distant signals.

On March 17, 1966, Midwest Television, Inc., licensee of VHF television Station KFMB-TV, San Diego, California, filed a "Petition for Immediate Temporary and or Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area," naming Petitioners, among others, as respondents. (R. 1) A supplement to the petition was filed on April 4, 1966. (R. 121)

On April 7, 1966, Petitioners filed a "Petition for Reconsideration" of the Commission's Second Report and Order in Docket No. 15971, which petition is still pending before the Commission. On April 18, 1966, Petitioners filed an opposition to the Midwest petitions. (R. 194). Midwest, in turn, filed a reply on April 25, 1966, to the Opposition to the Motion for Temporary Relief (R. 404) and on May 3, 1966, filed a reply to the Opposition for Permanent Relief. (R. 506) Various pleadings were filed by other respondents in the proceeding.

On May 31, 1966, Petitioners filed a "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area'." This petition contained an exhibit in another case (Docket No. 16575) which showed that, according to the testimony of the expert witness of the Commission, the Grade B contours of all the Los Angeles VHF stations fell within the city limits of San Diego. On June 3, 1966, the Commission returned the pleading with a letter advising that the Commission would take official notice of the matter. However, the Memorandum Opinion and Order failed to mention this evidence submitted by its own experts, but erroneously stated that there was doubt as to the location of the Grade B contours of the Los Angeles stations. (Para. 18; R. 588).

On July 25, 1966, the Commission issued the Memorandum Opinion and Order which this Court is requested to review. (R. 577). In it the Commission concedes that Petitioners' CATV systems are not operating in violation of any of the new CATV rules. It then concluded that, in accordance with the statement in the Second Report and Order, the San Diego situation is a special case which the Commission will investigate and consider on an ad hoc basis to determine if any *new and additional* requirement or limitation should be placed upon CATV systems operating under these circumstances. (Para. 19; R. 588-589) It then designated the matter for hearing in an adversary proceeding on a series of broad issues which, in fact, constitute a further rule-making proceeding, to determine the extent of CATV penetration in San Diego, and the effect of CATV operations on local television stations in that market. The issues are as follows: (R. 593-594).

> "1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) of cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.
>
> "2. To determine whether the signals of any of the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.
>
> "3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.
>
> "4. To determine the present penetration of CATV service by CATV systems in the San Diego market

area and the potential penetration of CATV service under conditions of unlimited expansion.

"5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

"6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

"7. To determine whether any conditions of future import should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

"8. To determine whether expansion of any of Respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

"9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission."

The Commission then went on to determine the nature of the temporary relief to be afforded to Midwest Television, Inc. It ruled that pending final disposition of this proceeding, it would order Mission to confine delivery ". . . of the Los Angeles signals carried on its systems to subscribers within those areas where Mission . . . was operating on February 15, 1966." In addition, it ruled that Mission could continue its present service to persons who began receiving service and to those who signed subscription requests between the date of February 15, 1966, and the date of the Order. The Commission pointed out that Peti-

tioners could continue to construct lines and add new subscribers within these franchised areas ". . . *so long as the expansion is confined to the carriage of the San Diego-Tijuana signals.*" (Emphasis supplied) (Para. 26; R. 591) This language clearly demonstrates that the stay is in stark reality a final government sanction prohibiting the dissemination of certain television programs to the public of the San Diego area, for an indefinite period of time.[5]

On August 8, 1966, Petitioner, Southwestern Cable Co. filed a Petition For Review and an Application For Interlocutory Injunction. On August 10, 1966, Petitioners Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. filed a Petition For Review and a Petition For Stay Pendente Lite. After hearing, the Court on August 23, 1966, issued a partial stay of the Commission's order, allowing Petitioners to add new subscribers to their trunk and feeder lines in existence on August 23, 1966.

SPECIFICATIONS OF ERROR

1. The issuance of a stay restraining Petitioners from continuing their legal business within their franchised areas is unlawful, since the Commission is without statutory authority to issue such an order without a hearing.

2. The issuance of a temporary stay is arbitrary and capricious, since it is not based on valid findings that logically support the conclusions that the public and Midwest would suffer irreparable injury.

3. The issuance of a stay and the designation of this proceeding

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[5] Adversary proceedings of this nature may take years to resolve. One case of a somewhat similar nature has been in litigation before the Commission and the Courts for over twenty years. See, *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954 (U.S. App.D.C 1965), *cert. denied*, 383 U.S. 906 (1966).

for a hearing is unlawful and improper, since the Commission lacks the statutory authority to control and license CATV systems which are not common carriers and which do not engage in the transmission of energy or communication or signals by radio but rather only receive television signals off-the-air and carry these signals by wire to subscribers.

4. The issuance of a stay prohibiting Petitioners from carrying the signals of Los Angeles television stations and the provisions of the Commission's CATV rules, which limit the right of CATV systems to carry signals of their own choice, constitute an unreasonable and unwarranted prior restraint on freedom of speech and violate the First Amendment of the Constitution of the United States.

5. The issuance of a stay and the designation of the proceeding for hearing under the provisions of Section 74.1109 are unlawful and improper, since this section of the CATV rules is void for failure of the Commission to comply with the provisions of Section 4 of the Administrative Procedure Act.

SUMMARY OF ARGUMENT

In Point II, Petitioners urge that the issuance of the stay order is arbitrary and capricious, since the Commission failed to make the necessary findings of basic facts from which it could logically be inferred that the continued expansion of Petitioners' lawful business would cause irreparable injury to the public or to Midwest Television, Inc. An analysis of the Commission's Memorandum Opinion and Order clearly shows that the findings of basic fact were limited to speculative and irrelevant facts which in no way support the conclusion that the public interest required the issuance of a stay order.

In Point III, Petitioners explain the Federal Communications Commission's lack of statutory authority to regulate and control CATV sys-

tems in the manner contemplated by its present rules and the stay order in this proceeding. The Commission's authority is precisely defined and clearly limited by the Communications Act of 1934, as amended, and unless Title II or Title III of that Act provides the necessary authority, it does not exist. The Commission has conceded that CATV systems should not be regulated as common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission,* 359 F.2d 282 (U.S. App. D.C. 1966). On the other hand, except for special and specific statutory authorizations, all of the provisions of Title III of the Communications Act have to do with, or are related to, the licensing of radio stations. Thus, insofar as non-common carrier communication functions are concerned, the Commission (unless otherwise *specifically* authorized by statute) is authorized only to license radio stations, and its rule making activities must be related to and based on this licensing authority. See, *Regents of Georgia v. Carroll,* 338 U.S. 568, 94 L. Ed. 363 (1950). While Section 2(a) of the Communications Act applies ". . . to all interstate . . . communication by wire or radio . . .", this has no bearing on the Commission's authority to regulate CATV systems, even though such systems are determined to be "interstate communication," since none of the Act's provisions cover such systems. CATV systems do not require licenses within the meaning of Title III of the Communications Act, and they are not common carriers within the meaning of Title II. Accordingly, any rules adopted by the Commission looking to the regulation of such systems are inconsistent with the Act and, therefore, unlawful.

In Point IV, Petitioners contend that the Commission's stay, which prohibits their CATV system from carrying the signals of Los Angeles television stations in San Diego, is an unreasonable prior restraint upon freedom of speech which violates the freedom guaranteed by the First Amendment. There can be no question that the prior restraint has oc-

curred. The issues are whether or not a CATV system and the public are protected by the provisions of the First Amendment and whether the restraint is reasonable in light of public interest considerations which the Federal Communications Commission may lawfully consider. It is clear that a restraint on the right of a CATV system to carry the Los Angeles television signals cannot be justified by a scarcity of broadcast frequencies which factor has been the basis for the Court's approval of Commission actions placing limitations on the freedom of speech of broadcast licenses. The fact is that the prior restraint in the instant case has been imposed because of the Commission's speculation that the continued carriage of the signals of the Los Angeles stations would threaten the viability of the San Diego television stations. Such a speculative reason does not justify the direct prior restraint of freedom of speech imposed here on both Petitioners and the public of San Diego. In addition, the Commission, in seeking to eliminate economic competition to television stations in San Diego, has exceeded its statutory authority, and, therefore, such economic protection cannot be a justification for restraints on freedom of speech which are prohibited by the First Amendment.

In Point V, Petitioners argue that the adoption of Section 74.1109 of the Commission's Rules, the basis of the stay order challanged herein, is arbitrary and capricious, since no notice was given of the proposed adoption of the rule as required by Section 4 of the Administrative Procedure Act. In the Notice of Inquiry, the Commission indicated it intended to adopt interim rules to control off-the-air CATV systems which rules would be similar to the existing rules controlling microwave-fed CATV systems. The Commission specifically stated that a further notice of proposed rule-making would be issued prior to the adoption of the rules. Nowhere in the Notice of Inquiry were Petitioners placed on notice that the Commission intended to adopt a rule conferring new powers to issue injunctive relief against non-licenses,

without a hearing, and, by an *ad hoc* proceeding, to impose further and different requirements on CATV systems over and above the provisions of the other CATV rules.

ARGUMENT

I

The Commission Lacks the Statutory Authority To Issue a Stay Without a Hearing

Petitioners, Mission Cable TV, Inc., Pacific Video Cable Co., Inc., and Trans-Video Corp. submit that the Commission lacks the statutory authority to stay, without a hearing, the legitimate operation of their business. In this regard, Petitioners rely upon and incorporate by reference the argument of Southwestern Cable Co., contained in its brief filed in this proceeding.

II

The Issuance of the Temporary Stay Is Arbitrary and Capricious Since It Is Not Supported by Valid Findings

The Commission has not, prior to adoption of Section 74.1109 of its rules, attempted to use injunctive power in connection with the activities of non-licensees. To the extent that the Commission has issued stay orders in the past, they have always been directed at a matter clearly within its control and jurisdiction, i.e., an earlier order of the Commission. (See, Section 1.106(n) of the Commission's Rules and Regulations).

The Commission, in the instant case, has issued an order which, in the language of Section 74.1109, is denominated as "temporary relief", although it is effectively a stay order curbing Petitioners' lawful activities for an indefinite period of time. For this order to be validly issued,

the Commission must make findings of "basic facts", from which the ". . . ultimate facts in the terms of the statutory criterion are inferred." *Saginaw Broadcasting Co. v. Federal Communications Commission,* 68 App. D.C. 282, 288, 96 F.2d 554, 560 (1938). In the *Saginaw* case the Court set out the four part process the Commission must follow in making the necessary findings of fact to support an order:

> "(1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by application of the statutory criterion." *Supra* at 287, 96 F.2d at 559.

These basic findings of fact are necessary so that a court may properly exercise its review function. They must ". . . represent the determination of the administrative body as to the meaning of the evidence," and the ultimate facts must flow from these basic findings. *Saginaw supra* at 289, 96 F.2d at 561. In *Johnston Broadcasting Co. v. Federal Communications Commission,* 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949), the Court reaffirmed the Commission's obligation to make, from the evidence before it, basic findings of fact from which ultimate facts may be found by logical inference.

The Commission, itself, has set up certain standards for the granting of stays under Section 1.106(n) of its Rules, which standards constitute the elements of the statutory criterion of "public interest". The Commission, in denying a petition for stay pending reconsideration of an order granting a construction permit, enunciated these standards as follows:

> "It further appearing, that the petitioner has failed to demonstrate factually that unless a stay is issued the

> public (or its own interest) will suffer irreparable injury; that its allegation that Xenia's sole outlet, an FM station, will not survive in competition with a standard broadcast station in Xenia and that no other FM station will be assigned to that city are speculative; that as to its allegations that Greene County [Greene County Radio, the permit holder] is already making commitments with regard to construction of the station, the Commission has consistently rejected the contention that the expenditures of funds by a grantee and the construction of a station is so prejudicial as to require a stay because if petitioner is eventually successful in its request for reconsideration, the grantee's authorization would, of course, be nullified and any funds expanded by it would be lost;" *Speidel Broadcasting Corp. of Ohio,* 1 Pike and Fischer, R.R.2d 355, 356 (1963).

The Commission's standards for granting of a stay, set out in *Speidel Broadcasting Corp., supra,* are similar to court enunciated requirements for the issuance of a stay. See, *Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Commission,* 337 F.2d 221 (C.C.A.6th, 1964); *Associated Securities Corp. v. Securities and Exchange Commission,* 283 F.2d 773 (C.C.A. 10th, 1960); *Eastern Airlines v. Civil Aeronautics Board,* 261 F.2d 830 (C.C.A.2d, 1958); and *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission,* 104 U.S. App. D.C. 106, 259 F.2d 921 (1958).

It is submitted that the Commission has completely failed to make the necessary findings of fact to support the ultimate finding that the public interest requires the issuance of a temporary stay. The only findings of basic facts in the Commission's opinion appear in paragraphs 16, 17, 19 and 23, thereof. These findings, concisely restated, are that (1) there is one operating UHF station in San Diego, one outstanding construction permit for a UHF station, and one application for an educational UHF station; (2) several of Petitioners' CATV systems

commenced operations two to four months prior to the filing of Midwest Television, Inc.'s petition herein; (3) there are 380,000 housing units in San Diego County; (4) on February 15, 1966, there were approximately 17,000 CATV subscribers in San Diego County within KFMB-TV's Grade A contour (6,500 in the City of San Diego); (5) 17,000 homes constitute 4.6% of the housing units in San Diego County within KFMB-TV's Grade A contour; (6) there are approximately 294,000 homes within this contour in which CATV systems carrying Los Angeles signals have begun to operate; (7) this represents 78% of all San Diego County homes within KFMB-TV's Grade A contour; (8) approximately 90% of all homes in the county within the Grade A contour of KFMB-TV are located in areas covered by CATV franchises; (9) approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed; (10) the Los Angeles stations are located more than 100 miles from the San Diego main post office; and (11) there were discrete non-contiguous areas in which Petitioners' CATV systems operated as of February 15, 1966. (R. 587-589, 591) The Commission's opinion also sets forth certain allegations made by the various parties, but does not make findings of basic facts other than as outlined above.

Based upon these findings of basic fact. the Commission had to conclude that the following ultimate facts logically followed in order to issue a valid stay order: First, the continued expansion of Petitioners' CATV system will endanger the viability of San Diego television stations and thus cause irreparable injury to the public; second, that the same expansion will cause irreparable injury to Midwest Video, (KFMB-TV); and third, that the stay will not cause irreparable injury to Petitioners.

It is clear that there is no logical relationship between the findings of fact which were made and the findings of ultimate facts that should have been made. Thus, there are no findings which would allow the

Commission to conclude that the public interest standards, justifying the issuance of a stay, exist in this case. The findings of fact reveal nothing but speculation and irrelevant facts. The logical inference, required by law, is completely missing. The fact is that the Commission did not know on July 25, 1966, and does not know today, whether irreparable injury would result to the public interest if a stay were not issued. It is submitted that the issuance of the temporary stay, unsupported by the necessary findings of basic fact, is clearly an arbitrary and capricious action and must be set aside.

III
The Federal Communications Commission Lacks Statutory Jurisdiction To Regulate CATV Systems

If the Commission lacks the statutory authority to control, license, or otherwise regulate community antenna television systems, it is clear that its Order staying Petitioners' business operations, pending the hearing contemplated by the July 25, 1966, Memorandum Opinion and Order, is also unlawful and must be set aside by this Court. For this reason, an analysis of the pertinent sections of the Communications Act of 1934, as amended, is required. 66 STAT. 1064 *et seq.*, 47 U.S. C.A. § 151 *et seq.*, (1962). [6]

Under the Communications Act the Commission has two principal and separate functions. On the one hand, it is a regulator of a public utility type of activity (Title II), and, on the other, it is an agency that licenses radio stations (Title III). Here we need be concerned only with the latter, for the Commission has held that CATV systems are not

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[6] In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other Sections are identically numbered in both the Act and the Code.

common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission,* 359 F.2d 282 (U.S. App. D.C. 1966).

Somewhat inconsistently, however, the Commission claims to have the required authority to adopt the CATV rules, and thus to determine whether and to what extent citizens of this country may engage in the perfectly legal business of operating a CATV system, because Section 2(a) of the Communications Act provides that the provisions of the Act ". . . shall apply to all interstate and foregin communication by wire or radio and all interstate and foreign trnasmission of energy by radio ...". The simple fact of the matter is, however, that there are no *provisions of the Act* that even remotely purport to have anything to do with the control and regulation of wired communication systems that are not common carriers within the meaning of Title II of the Act.

No study or analysis of the legislative history of the Communications Act of 1934, however twisted or tortured, can lead to a conclusion that the Congress, when it adopted the Act, intended anything other than to place the responsibility for administering two separate and distinct statutory laws under one governing body — the Federal Communications Commission. True, those laws — the Interstate Commerce Act, insofar as it pertained to common carrier communications by telegraph, telephone and cable companies, and the Federal Radio Act — were amended in the process, but there were no amendments which contemplated new areas of jurisdiction and responsibility for the Federal Government.

Thus, as the Senate Committee explained in its report on the then proposed Communications Act of 1934, the legislation contains ". . . many provisions . . . copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business . . .". The Report also points out that, while in some paragraphs the language is changed, the ". . . variances or

departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective." S. R. No. 781, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:221, 10:222).[7]

Legislative history thus establishes that the primary purpose of the Communications Act of 1934 was simply to provide for the regulation of common carriers and for the licensing of radio stations by the

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[7] The House also made it clear that no changes in the substance of previous legislation were contemplated by the Communications Act of 1934. Its Report explained the new legislation as follows:

> "The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations . . . .
>
> * * *
>
> "It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass adequate regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:243-10:244).

same agency. Congress did not intend — and the Act does not essay — to create new areas of federally regulated activity.

Moreover, the new Act made no changes of substance with respect to the Federal Government's responsibility in the radio field. While the Commission can and does exercise some measure of control over the operations and activities of the radio stations it licenses, such control stems from the licensing function, and the basis for control and regulation is the license. The statutory prohibition as provided in Section 301 of the Act is simply that the use or operation of any apparatus *for the transmission of energy or communications or signals by radio* is unlawful unless such use or operation is first licensed by the Commission. Absent such a license, a user or operator of radio apparatus is subject to fine and imprisonment.

Title III of the Act is entitled "Provisions Relating to Radio" and each and every Section of Title III in fact does relate to radio. Furthermore, with a few exceptions, i.e., Section 303(s), all of the provisions of Title III relate only to the radio *transmission* function. Title III of the Act does not purport to be concerned with *the reception* of radio signals and until the adoption of the rules at issue here the Commission has never asserted that reception of radio signals or dissemination of information by wire (except by a carrier subject to regulation under Title II of the Act) was any of its business or concern.

The Act has not been changed and a radio station, the apparatus with which the Commission is concerned, is still only a station "equipped to engage in *radio* communication or *radio* transmission of energy." A CATV system is not equipped to engage in *radio* communication or *radio* transmission of energy. It is equipped only to engage in "wire communication" and, therefore, subject to regulation only if it functions as a common carrier within the meaning of Title II of the Act.

In asserting that it does have jurisdiction over CATV systems, the

Commission relies only on the general rule making authority granted it by such Sections as 4(i) and 303(f) and (r) which, says the Commission, ". . . includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of Section 307(b) by CATV — and 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and 3(a))." See, *Second Report and Order, Dockets* 14895, 15233 and 15791, 31 F.R. 4540, 4541; 2 F.C.C. 725; 6 Pike & Fisher, R.R. 2d 1717, 1727 (1966).

This statement, however, begs the question. Petitioners concede that the Commission has, and must have, authority to adopt rules and take actions "not inconsistent with the Act or law." The key, however, is that its rules and actions *must be consistent with the Act or law* and the particular question for decision is whether the CATV rules and the actions complained of in this appeal are consistent with the authority granted the Commission by law, i.e., by the Communications Act of 1934, as amended.

As the Supreme Court has explained with respect to the extent of the Commission's authority under the so-called general rule-making provisions of the Act, such Sections as 303(r) must be interpreted and applied in connection with the Commission's power to license radio stations. *Regents of Georgia v. Carroll,* 338 U.S. 568, 600, 94 L. Ed. 363, 374 (1950).[8] Only when so limited and related are rules and actions of the Federal Communications Commission valid and lawful.

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[8] In *Regents of Georgia v. Carroll, supra* at 597-599, 94 L. Ed. at 373-374, the Supreme Court also stated as follows (footnotes omitted):

> ". . . As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. 47 USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the

The Commission is not relying on its licensing power in support of its CATV rules and actions, and there are no other powers provided by law on which to rely. In particular, there are no provisions in the Communications Act having to do with the regulation of wired communications systems other than those governing common carriers. Otherwise, insofar as material here, the Commission's authority — and all pertinent provisions of the Act — have to do with the licensing of radio stations. The CATV regulations contemplated by the rules and actions here involved obviously are not consistent either with the provisions of the Act (or any other law) concerning common carrier regulation or with those concerning the licensing of radio transmission and, accordingly, must be declared unlawful for the very reasons the Commission relies on in support of their validity.

The Commission would have it appear (without explanation) that the CATV rules, and the actions here complained of, are necessary for the purpose of carrying out the provisions of Section 307(b) of the Act, i.e., "to prevent frustration of Section 307(b) by CATV." Section 307(b), however, is specifically limited to the licensing and regulation of radio stations and in view of *Regents of Georgia v. Carroll, supra,* no validity can be attached to the Commission's assertion of jurisdiction over wired CATV systems. Moreover, Section 307(b) has nothing to do with

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licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 US 470, 475, 84 L ed 869, 874, 60 S Ct 693; National Broadcasting Co. v. United States, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions."

the establishment of any communications policy – federally dictated or otherwise. It does not assure any person, or any community, or any group of persons, access to any television signals or programs. It merely directs the Commission, when it considers "...applications for licenses, and modifications and renewals thereof, ..." and "...when and insofar as there is a demand for . . ." the facilities applied for, to ". . . make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

CATV systems have no need for radio frequencies; they are not making a demand for them, and they are not applying to the Federal Communications Commission for anything. It is submitted, therefore, that Section 307(b) has nothing to do with the operation of a perfectly lawful and locally authorized CATV business, the only purpose of which is to perfect the ability of the public to receive the "radio communications" that the Communications Act specifically indicates the public is entitled to receive.

Petitioners have no quarrel with the Commission's objective of allocating and assigning broadcast frequencies with a view to "making available, *so far as possible,* to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communications service" (emphasis supplied). This, in fact, is the responsibility Congress has assigned to the Commission under Section 1 of the Communications Act. On the other hand, Petitioners do challenge the legality of the Commission's efforts to foreclose CATV service to those "people of the United States" who at the very least must feel that such service adds to the *efficiency* of their television "service." Some of those people must also believe that CATV brings them somewhat closer to nation-wide, and even world-wide, communication than they would be if left solely to the offerings of stations which they, as individuals, can receive directly off-the-air.

In any event, it is clear that Congress never intended, and that Section 1 of the Communications Act does not direct, the Federal Communications Commission to assume the responsibility of insuring any kind of communications system to "the people of the United States." Section 1 merely states the purpose for which the Federal Communications Commission was created. The power and authority to be exercised by the Commission, and the limitations on its power and authority, are thereafter proscribed by Titles II and III of the Act.[9]

If Title III of the Act gives the Commission the power and authority to control non-common carrier CATV systems so that those systems do not frustrate Section 307(b), and the allocation policies adopted by the Commission with a view to implementing the objectives of that Section, then the Commission also has the power and authority to adopt rules and regulations requiring television viewers to tune their sets only to their home community stations. Section 307(b) and the Commission's allocation policies are just as likely to be frustrated by tall receiving antennae, individually owned and maintained, as by CATV connections. Obviously, however, the Communications Act in general,

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[9] As pointed out above, the Commission's principal basis for asserting jurisdiction over CATV systems and for adopting the rules here involved appears to be the need for implementing Section 307(b) of the Act. However, the Commission also contends that the rules are proper implementations of Sections 1 and 303(h) and (s). Section 303(h) authorizes the Commission "to establish areas or zones to be served by any station" and 303(s) to require that only so-called "all channel" (VHF and UHF) television receiving sets be shipped in interstate commerce. The CATV rules obviously have nothing to do with defining areas to be served by radio (television broadcast) stations or with the shipment of receiving sets in interstate commerce. Sections 308 and 309 are also mentioned as a basis for the Commission's authority in the Second Report and Order, but an explanation of their relationship is not attempted. In any event, with the exception of 303(s), the authority given the Commission by any of these Sections of the Act must be limited and related to the Commission's basic power to license radio stations. *Regents of Georgia v. Carroll*, *supra*. As to Section 303(s), the authority therein provided was specifically given the Commission by a separately adopted amendment to the Act. Its proper relationship to the present controversy is explained *infra*.

and Section 307(b) in particular, do not authorize the Commission to dictate which stations viewers may watch on their sets.

If, in fact, the Communications Act does empower the Commission to adopt rules and take actions governing CATV systems in order that Section 307(b) not be frustrated, then the Act, prior to July 10, 1962, also empowered the Commission to adopt any rules and to take any actions necessary to insure that all television receiving sets shipped in interstate commerce be capable of receiving all frequencies (VHF and UHF) allocated by the Commission to television broadcasting, *and it now empowers the Commission to foreclose the sale of any television receiving set capable of receiving Los Angeles television station signals to any resident of San Diego or any other community.*

There is no legally significant difference between foreclosing or limiting the use of CATV apparatus and foreclosing or limiting the use of individual receiving sets, yet in 1962 the Commission stated that it needed legislation to accomplish the latter [10] while today it insists it needs no legislation to accomplish the former. If this Court affirms the Commission's actions asserting jurisdiction over CATV systems, it will judicially sanction the power and authority of the Commission to dictate the receiving capacity of every television set used, not only in the San Diego area, but throughout the country.

Furthermore, the two methods of reception, one via CATV wire connections and the other via home receiving antennae and related transmission lines, cannot be legally distinguished on the basis of Sections 2(a) and 3(a) of the Act. Section 2(a) merely provides that the *provisions* of the Act shall apply to all interstate and foreign communications by wire or radio, i.e., the provisions of Title II shall apply to

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[10] See, H. Rep. No. 1559, 87th Cong., 2d Sess. (1962), and S. R. No. 1526, 87th Cong., 2d Sess. (1962), to accompany H.R. 8031 (1 Pike & Fischer, R.R. 10:481-10:518).

common carriers (whether engaged in wire or radio communications), and the provisions of Title III shall apply to the licensing of *radio* stations.

Section 3(a) on the other hand (as well as Section 3(b)), is merely concerned with defining "communications" to insure that all phases of common carrier activity — not merely the transmission function — are subject to regulation under the provisions of Title II. In this connection, it will be noted that the definitions of "wire communication" and "radio communications" in Sections 3(a) and (b) include ". . . all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to . . . transmission." The basic purpose of including in both Sections 3(a) and (b) such "services" as the "receipt, forwarding and delivery" of communications as well as "instrumentalities, facilities, apparatus," incidental to transmission was to assure that all phases of point-to-point wire and radio communications would be subject to the provisions of Title II of the Act. By their very terms, these Sections have no meaning insofar as the licensing and related provisions of Title III of the Act are concerned. If Congress had intended to include the receipt, forwarding and delivery of radio signals *per se* within the meaning of the Commission's non-common carrier licensing responsibilities, it would have done so specifically. In particular, it would have done so in Section 3(o) wherein "broadcasting" is defined.

It follows, therefore, that Sections 2(a) and 3(a) of the Act cannot be used as a bridge whereby the provisions of Sections 303(f), (h), (p), (r) and (s), 307(b), 308, 309 or any other Section of Title III are made applicable to the dissemination of information (writing, signs, signals, pictures, sounds, etc.) by wire, cable or other like connections or to the reception of such information so transmitted. These provisions deal specifically with "radio stations" and the transmission of radio energy, and they are applicable only to radio stations. Since CATV

systems are not radio stations, they cannot be controlled or regulated in any way under Title III of the Act, and the Commission's efforts to so control and regulate them are, therefore, unlawful.

As pointed out hereinafter (see, footnote 13, *infra*,) the Commission, itself, determined in 1959 that it could not lawfully regulate CATV systems as it now asserts it can. The base of the Commission's authority, the Communications Act, has not been changed since this pronouncement and, consequently, the Commission has no more power and authority today than it had in 1959.[11] While the Commission has again recently requested the Congress to amend the Act so as to specifically

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[11] The Commission's admitted lack of jurisdiction over CATV systems was judicially noticed by the United States District Court for the District of Idaho (Southern Division) in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (1962), *reversed on other grounds*, 335 F.2d 348 (C.C.A. 9th, 1964), wherein, at page 55, the Court stated as follows:

> "As indicated in this Court's previous discussion of the history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 USC 153 (a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services. . . .
>
> "So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not now have jurisdiction over community antenna services."

Earlier, on September 8, 1959, Senatore Pastore, from the Committee on Interstate and Foreign Commerce, reported to the United States Senate Bill S. 2655 entitled, "A Bill to amend the Communications Act of 1934 *to establish jurisdiction in the Federal Communications Commission* over community antenna systems." (Emphasis supplied) Calendar No. 950, S. 2653 (Report No. 923), 86th Cong., 1st Sess. In 1960, following debate on the floor of the Senate, this Bill was recommitted to the Committee. 106 Cong. Rec. 10326, 10344, 10407, 10520, and 10547.

If, as is specifically stated, the purpose of S.2653 was to establish the Commission's jurisdiction over CATV, then its failure of passage of necessity left the Commission where it was (and where it is today), i.e., without jurisdiction.

give it statutory authority over CATV systems (See H. Rep. No. 1635, 89th Cong., 2d Sess., submitted June 17, 1966, to accompany H. R. 13286), no legislation has been forthcoming.

Moreover, there is a serious question as to whether H. R. 13286 or any similar legislation will ever be adopted. Consider, for instance, the following minority views on the Bill (H. Rep. No. 1635, *supra,* at pages 23 - 25):

> "H. R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set — to name a few of the flaws.
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> "Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the lim-

ited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

"The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

"H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

"A CATV system is a wired communications system and does not use the spectrum or public domain

for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

"There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is rebroadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

"The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Com-

mission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communication Act prohibits censorship.

"If the Congress passes H. R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals — jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

* * *

"It is to be noted that the Federal Communications Commission, although previously denying jursidiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled

> authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly — an entirely new concept in governmental regulation."

The legislation proposed in H.R. 13268 would give the Commission essentially the same jurisdiction, power and authority, which the Commission has already asserted without benefit of statute. Obviously, its asserted authority, and the attempted exercise thereof in the manner provided by the CATV rules and the action here on appeal, are unlawful, among other reasons, because Congress has not "put its stamp of approval on such action."

For these reasons, it is submitted that the Commission lacks the statutory authority to regulate CATV systems and the order staying the expansion of Petitioners' lawful business is illegal and must be set aside.

IV

The CATV Rules and the Issuance of a Stay Thereunder Abridge Petitioners' and the Public's Right to Freedom of Speech Protected by the First Amendment

The Commission's stay order, issued under the authority of Section 74.1109, which specifically prohibits Petitioners' CATV systems from carrying the signals of the Los Angeles television stations to new subscribers in the San Diego area raises an important constitutional issue. Moreover, the constitutional issue is also presented by the fact that the CATV rules limit the right of CATV systems to carry the television signals of their choice, require that certain other television signals must be carried, and require non-duplication of other television signals. It is submitted that both the stay order and the rules constitute a prior restraint which is prohibited by the First Amendment, if it is determined that CATV systems are entitled to this protection, and

there are no public interest considerations justifying such restrictions. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 96 L. Ed. 1098 (1952); *Near v. Minnesota,* 283 U.S. 697, 75 L. Ed. 1357 (1931).

The first question to be answered is whether the transmission of television signals by CATV systems is within the purview of the First Amendment. [12] In this regard, it is clear that the Supreme Court has been liberal in its interpretation of the protection afforded by the First Amendment. It has held that retail book sellers, newspapers, pamphlets, leaflets and every sort of publication, motion pictures and stage presentations are protected. *Smith v. California,* 361 U.S. 147, 4 L.Ed. 205 (1959); *Kinglsey International Picture Corp. v. Regents of University of State of New York,* 360 U.S. 684, 3 L. Ed. 2d 1512 (1959); *Lovell v. City of Griffin,* 303 U.S. 444, 82 L. Ed. 949 (1938).

The right of freedom of speech and the press, guaranteed by the First Amendment, includes not only the right to utter or to print, but also the right to distribute, the right to receive and the right to read. *Griswold v. Connecticut,* 381 U.S. 479, 14 L. Ed.2d 510 (1965). See also, *Saia v. New York,* 334 U.S. 558, 92 L. Ed. 1574 (1948); *Winters v. New York,* 333 U.S. 507, 92 L. Ed. 840 (1948). "This freedom clearly embraces the right to distribute literature and necessarily protects the right to receive it." *Martin v. Struthers,* 319 U.S. 141, 143, 87 L. Ed. 1313, 1317 (1943). In *Lovell v. Griffin, supra,* at 452, the Court stated:

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[12] The Commission suggests in its Motion for Reconsideration of the Stay Order, page 24, that CATV systems need authorizations to carry the signals of television stations. Except for copyright requirements and the new CATV Rules which provide that certain signals cannot be carried without permission, Petitioners know of no legal authority that a CATV system is not free to carry the signals of any television station. The Commission cites no authority for its contention. See, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (C.C.A. 9th, 1964), *cert. denied*, 379 U.S. 989, 13 L.E. 2d 609 (1965).

> "Liberty of circulation is as essential to the freedom as liberty of publishing; indeed, without circulation, the publication would be of little value."

The same statement was cited with approval by the Supreme Court in *Talley v. California,* 362 U.S. 60, 64, 4 L. Ed. 2d 599, 563 (1960).

Finally, both the Courts and the Federal Communications Commission have held that communication by radio and television falls within the Constitutional protection. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.,* 360 U.S. 525, 529, 3 L. Ed. 2d 1407, 1411 (1959); *National Broadcasting Co. v. United States,* 319 U.S. 190, 226-227, 87 L. Ed. 1344, 1368 (1943); *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 166, 92 L. Ed. 1260, 1297 (1948) (dictum); *Superior Films, Inc. v. Department of Education,* 346 U.S. 587, 588-589, 98 L. Ed 329, 331 (1954) (concurring opinion). See *Rumeley v. United States,* 90 U.S. App. D.C. 382, 393, 197 F.2d 166, 177 (1952), *aff'd,* 345 U.S. 41, 97 L. Ed. 770 (1953); *Report and Statement of Policy on Programming Inquiry,* 20 Pike & Fischer, R.R. 1901, 1905 (July 29, 1960); In re, *Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM,* 7 Pike & Fischer, R.R. 2d 565, 567 (1966).

In light of these cases, there can be no doubt that CATV systems are also entitled to the protection of the First Amendment. In line with these authorities, the Supreme Court of California, in *Weaver v. Jordan,* 411 P.2d 289 (California 1966), held that subscription television is protected by the constitutional guarantee of free speech. Subscription television (the dissemination by wire of programs originated by the system which the viewer receives upon payment) uses method of transmission identical with that of CATV systems. In this opinion, the Court distinguished the Supreme Court's decision in *National Broadcasting Co., Inc. v. United States, supra,* and stated:

> "We are convinced that the sweeping suppression

> of home subscription television as attempted by the Act now before us, would, contrary to the Act declarations, encourage and foster monopolistic domination by existing television stations deriving their financial support from commercial advertisers. (See fn. 11, *ante*) Monopoly in the field of communication can best be avoided by permitting the growth of that field of endeavor in directions and through media which will provide the widest possible range and choice of ideas and of expression." *Weaver v. Jordan, supra* at 299.

More important, the freedom involved in this case is not just that of Petitioners. It is the freedom of the American public, in this case the citizens of the San Diego area, which is restricted by the Commission's action. They are the ones who are now denied the right to receive the signals of the Los Angeles stations, for an indefinite period, and may be permanently deprived of the right under the self-granted authority asserted by the Commission in Section 74.1109. Moreover, there can be no doubt that Petitioners have standing to assert the right of the American public to receive the television signals of their own choice. *Griswold v. Connecticut, supra,* at 481; *Barrows v. Jackson,* 346 U.S. 249, 97 L. Ed. 1586 (1953); *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. Ed. 1070 (1925).

Once it has been determined that the rights of parties under the First Amendment have been affected by the action challenged, it is the duty of this Court to determine whether such conduct is prohibited. In reality, therefore, the real issue is whether there exists some public interest factor which justifies a restriction of the freedom of speech guaranteed by the First Amendment. In this regard, one must keep in mind the warning of the Supreme Court that ". . . any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 9 L. Ed. 2d 584, 593 (1963). The Court has also stated

that only considerations of the greatest urgency can justify restrictions on freedom of speech, and the validity of a restraint of speech in each instance depends on careful analysis of the particular circumstances. *Speiser v. Randall,* 357 U.S. 513, 521, 2 L. Ed. 1460, 1469 (1958).

The Commission insists that its power to restrict freedom of speech comes from the power delegated to it by Congress to regulate interstate commerce. The Supreme Court in *American Communications Ass'n. v. Dowds,* 339 U.S. 382, 399, 94 L. Ed. 925, 944 (1950), *reh. denied,* 339 U.S. 990, 94 L. Ed. 1391 (1950), pointed out how conflicts between the commerce power and the First Amendment are to be resolved:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these conflicting interests demands the greater protection under the particular circumstances presented."

In this case, however, the order and regulation result in a direct abridgement of speech. Thus, the justification for the restrictions must be more clear and compelling. It is submitted, however, that the Memorandum Opinion and Order of the Commission discloses no evidence nor does it make any valid findings of fact of the existence of any matters or interests that justify the prior restraint imposed in this instance.

The Courts, while holding that radio and television are protected by the principle of freedom of speech, have agreed that this freedom is not absolute. Just as the First Amendment does not protect speech which seriously threatens interests the government should protect, so too the nature of broadcasting may permit limited regulation without violation of the First Amendment. However, a distinguishing feature emerges from an analysis of the decisions of the past and the present

case — all of the past actions of the Commission, that have been affirmed by the Courts, dealt with applicants and licensees using, or seeking to use, the radio spectrum. Because of the scarcity of spectrum space, when read in context with the Congressional standard of "public interest, convenience or necessity," the Courts have found that limited restraints on program content were legitimate measures for the protection of the public.

The Supreme Court in *National Broadcasting Co. Inc. v. United States, supra,* held that the right of free speech does not include the right to use the facilities of radio without a license. Based upon that premise, the Courts have extended the exception in other areas, such as requiring an investigation of the needs of the community in order to obtain a license. See, *Henry v. Federal Communications Commission,* 112 U.S. App. D.C. 247, 302 F.2d 191 (1962), *cert. denied,* 371 U.S. 821, 9 L. Ed. 2d 60 (1962). In every case, however, the extension of the "public interest", at the expense of the protection afforded by the First Amendment, has been justified by the concept of a scarcity of radio frequencies and the need to control and license facilities using these frequencies.

The two most recent cases from the United States Court of Appeals for the District of Columbia Circuit are based upon the same principle. In *Carter Mountain Transmission Corporation v. Federal Communications Commission,* 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied,* 375 U.S. 951, 11 L. Ed. 2d 312 (1963), the appellant was a common carrier applicant seeking a license to use microwave frequencies. The Court specifically cited *National Broadcasting Co., Inc., supra,* and held that a conditional grant of license, which is the same as a denial of a license, does not constitute censorship. Moreover, in that case, the Court specifically declined to rule upon the right of the CATV system which was not before the Court. The same reasoning was followed in *Idaho Microwave, Inc. v. Federal Communications Commission,* 352 F.2d 729 (C.A.D.C. 1965).

Because CATV's do not use this valuable spectrum space and their operation in no way limits or curtails the assignment, location and operation of television stations, it is clear that the restrictions on freedom of speech, imposed upon broadcasting, cannot validly be applied to CATV systems. Therefore, any justification for the Commission's prior restraint imposed by the stay order and the CATV rules must come from some other source.

It is also clear that no "clear and present danger" that a substantive evil will otherwise result, which the Commission has a right to prevent, exists in this case. The sole purpose of the rules, as admitted by the Commission, is to prevent the possible demise of UHF television stations, because of economic competition, and the purpose of the stay is to prevent this same result in San Diego. Yet there is nothing in the Memorandum Opinion and Order to show that this danger will occur within the time needed for the Commission to complete a hearing on the merits. Moreover, the issues in the hearing clearly demonstrate that even this alleged "danger" is nothing more than supposition and conjecture at this time and, in fact, is the ultimate issue to be determined by the hearing. Such speculation and conjecture clearly do not constitute the "clear and present danger" which can justify immediate and total restraint of Petitioners' right to transmit television signals over their wired CATV systems.

More important, it is submitted that the stay and the new rules seek to prevent a result which is clearly beyond the power of the Commission to accomplish. The admitted purpose of the rules and the stay is to protect UHF stations from economic competition. To reach this conclusion, the Commission, has assumed, without any findings or evidence to support this assumption, that the public interest requires that San Diego be guaranteed that three UHF stations will be able to exist and the Commission is obligated to suppress or control any economic competition that might threaten the economic well-being of these sta-

tions. The Commission may just as logically and legally limit the amount and kind of news in newspapers which is received from the press services (these services use wire and radio facilities and are in competition with radio and television), the amount and kinds of full-length features that are shown in local theatres (these films are shipped in interstate commerce and compete with films on television), and the height and design of receiving antennae that may be erected by local citizens (for example, in San Diego the receipt of off-the-air Los Angeles signals obviously fragments the local station's audience). The Commission has, in effect, declared that the contents of all sources of information and entertainment may be controlled so that each local television station can be guaranteed an audience and thus survive whether the local citizens desire it or not.[13] In addition, the Commission has created and adopted a second assumption which has never been proven and may not be susceptible of proof. This assumption is that the public interest requires that American citizens be limited to viewing local television stations, no matter what may be their desires and interests. The Commission has taken this drastic step of curtailing the freedom of speech of CATV systems and the freedom to view of American citizens in order to protect an economic monopoly.

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[13] In 1959, when the Commission declined to assume jurisdiction over CATV systems, it made the following statements in its Report and Order:

> "In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration." 26 FCC 403, 431-432 (1959).

It is unnecessary to demonstrate by reference to legislative history, and the circumstances which led to their original enactments, that the principal objectives of the Radio Act of 1927, and of Title III of the Communications Act of 1934, were the regulation of the technical aspects of radio frequency allocation, to provide relief from the interference chaos that had developed prior to 1926, to establish a system for the fair, equitable, and efficient distribution of such frequencies in the future, and to regulate ownership and control of stations so as to preserve competition and prevent monopoly in radio communication.

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.
>
> "In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has

done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

* * *

". . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

* * *

". . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 474-475, 84 L. Ed. 869, 873-874 (1940).

If, as the Supreme Court says, Congress intended "to leave competition in the business of broadcasting where it found it" and to permit a broadcaster "to survive or succumb according to his ability to make his programs attractive to the public," it obviously intended that the broadcaster was not to be protected against competition.

All free competitive businesses, of course, are subject to some limitations and restrictions, both as to location and product or service, but the restrictions and limitations are such that they do not change the free competitive nature of the business. Otherwise, the business ceases to be freely competitive and becomes a public utility subject to regulation.

Obviously, as the Supreme Court made clear in the *Sanders* decision, Congress did not intend to subject the business of broadcasting to public utility regulation, or to anything similar thereto. In a few instances, Title III of the Communications Act (and its predecessor The Radio Act of 1927), from which the Commission derives its authority, singles out broadcasting for special legislative and regulatory treatment, but otherwise, the Commission's statutory power, authority, and responsibility in connection with the licensing of radio stations for broadcast use is no different than its power, authority, and responsibility in connection with the licensing of the many other classes and types of radio stations subject to the Commission's jurisdiction.

It is not necessary to cite authorities for the proposition that the paramount public policy of the United States as to the relationship of government to business is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the Federal level, if they can legally be made at all, can be made by Congress. Tampering with a free competitive business by government to the extent of eliminating competition places that business at least in a public utility category, if not in a category subject to even more governmental supervision, direction, and control than attaches to public utilities.

That Congress did not intend such a result is best illustrated (except perhaps by the language of the Act itself) by the proceedings in the United States Senate in connection with S. 1333. (A Bill to Amend the Communications Act of 1934, and For Other Purposes). S. 1333, among other things, proposed to amend Section 307(b) of the Communications Act of 1934 [14] to read as follows:

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[14] Section 307(b), then as now, reads as follows:

> "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for

> "In considering applications for licenses, and modifications thereof, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same, *giving effect in each such instance to the needs and requirements thereof.*" (Emphasis supplied) *Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1333*, 80th Cong., 1st Sess. (1947) 5.

The obvious purpose of the foregoing amendment was to eliminate the clause "when and insofar as there is demand for the same" from Section 307(b) and to substitute a general requirement that the Commission give effect to the "needs and requirements" of communities where, there was no competitive application from another community for the frequency involved. Testifying in opposition to this amendment, the then Chairman of the Federal Communications Commission, after explaining that the amendment "would delete the requirement as to demand and instead require the Commission to give effect to the needs and requirements of the various communities", pointed out that if the amendment merely required "the Commission to consider the needs and requirements of communities when the issue before the Commission is a question of which of two competing applications from different communities should be granted", it would not be objectionable, since Section 307(b) "as it now stands" requires the same consideration. The change would be objectionable, he testified, if the amendment would require the Commission to consider the "needs and requirements" in the absence of a "competitive application from another community for that frequency." (Id at 33) He then stated:

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the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

> "Under the normal operation of the competitive system either you have free competition, or you do not. Either you have free competition, or you have some restriction on free competition.
>
> "Now, if this section is adopted as written, it is certainly going to be urged that it imposes very definite restrictions on free competition; so much so that I am afraid it is going to be successfully argued that if it were enacted, it would throw the competitive system out the window.
>
> "We do not want to do that, and therefore I think that if we are to have some limit on free competition, we have got to have some compass to guide us and tell us exactly what the limits are. I think we have got to work out the formula here in these sessions." (*Id.* at 40)

The proposed amendment was not adopted and thereafter the Court of Appeals for the District of Columbia Circuit acknowledged that the principal of free competition continued to govern the Federal Government's relationship to the broadcast industry:

> ". . . Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service. . ." (Emphasis supplied) *Easton Publishing Co. v. Federal Communications Commission,* 85 U.S. App. D.C. 33, 35, 175 F.2d 344, 346 (1949).

Heretofore, the Commission has asserted, and the Courts have upheld, the right to consider economic competition in one instance, alone. This right has been limited to the effect of economic competition upon the public interest in awarding a license to a new broadcast station when it would be in competition with an existing station in the same community. This doctrine was promulgated over the objections of the Commission, by the United States Court of Appeals for the District of Columbia Circuit in *Carroll Broadcasting Co. v. Federal Communications Commission,* 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443. (1958). In that case, the Court held that under the language of *Sanders, supra,* the Commission had the power and responsibility to determine whether the award of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. The Court then stated:

> "This opinion is not to be construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof, and, if the evidence is substantial (i.e., if the protestant does not fail entirely to meet his burden), should make a finding or findings."

Since that time, the same Court has upheld the doctrine in awarding airline licenses, *Delta Air Lines, Inc. v. C.A.B.,* 107 U.S. App. D.C. 180, 275 F.2d 632 (1959), microwave licenses, *Carter Mountain Transmission Corporation v. Federal Communications Commission, supra,* and in rule making proceedings for the allocation of additional television channels to a community. *Fort Harrison Telecasting Corporation v. Federal Communications Commission,* 116 U.S. App. D.C. 347, 324 F.2d 379 (1963). It has agreed with the Commission that the doctrine does not

apply to assignment of licenses but only to original grants. *Valley Telecasting Co., Inc. v. Federal Communications Commission,* 338 F. 2d 278 (U.S. App. D.C. 1964).[15]

The Commission now claims the authority to control economic competition by non-licensed businesses so that it can guarantee that existing broadcast licensees will be able to operate in the "public interest." It asserts this power, not over other licensees, but over CATV systems and, more importantly, the public. If it can successfully curtail the public's freedom to view by limiting the right of CATV systems to deliver television signals, it can also curtail the public's right to erect tall antennae by which it is able to receive Los Angeles television signals off-the-air. It can also require television manufacturers to sell sets in San Diego capable of receiving local television signals only.

The Commission has consistently maintained that its rules and policies setting up the "fairness"[16] doctrine are constitutional because they protect the right of the American citizen to see and hear what he chooses. In the 1949 Report, *Editorializing by Broadcast Licensees,* 13 FCC 1246, 1257 (1949), the Commission stated:

> "The most significant meaning of freedom of the radio is the right of the American people to listen to the great medium of communications free from any government dictation as to what they can or cannot hear and free alike from similar restraints by private licensees."

The stay in this case and the new CATV rules violate this basic concept.

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[15] The doctrine, even in present limited aspect, has been the subject of criticism. *Refusal of Radio and Television Licenses on Economic Grounds*, 46 Va. L. Rev. 1391 (1960).

[16] The doctrine provides that, if a station presents one side of a controversial issue, it must seek out and present the opposing viewpoint.

This Court is charged with the duty of determining whether the freedom granted by the First Amendment may be curtailed by the Commission in an effort to limit economic competition to local television stations. It must determine whether the American public is to see over the air only what the Commission and local licensees choose to give them. There is no evidence, findings or suggestions that the three VHF stations in the area cannot compete against Los Angeles television signals. There is nothing but speculation that UHF stations can survive in the face of VHF competition *only if the service of CATV systems are curtailed or eliminated.* It is clear that these factors do not constitute "considerations of the greatest urgency" which justify these direct restrictions on freedom of speech and the public's freedom to view the programs of its own choice. Even if UHF television in San Diego must cease to exist, it would be a small price to pay to protect the freedom of the American people to view television programs of its own choice, which programs are freely available to it. Such a limitation cannot be justified by the Commission's assertion that CATV systems are "legally and in every practical sense a part of the interstate transmissions of the stations" whose signals are carried on their cables and thus subject to the same restrictions as television stations themselves.[17] This fact might give Congress the power to control CATV systems in some respects if it chose to do so, but it is no justification for direct restrictions upon freedom of speech. For these reasons, it is submitted that the Commission's stay, prohibiting Petitioners from bringing Los Angeles television signals to the citizens of San Diego, and the provisions of the CATV Rules limiting the right of CATV systems to carry the television signals of their choice are illegal and prohibited prior restraints upon freedom of speech.

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[17] Motion of Respondents for Reconsideration of Stay Order and Opposition to Motion for Stay, Case Nos. 21,183, 21,192, p. 24.

V

Section 74.1109 of the Rules Adopted by the Commission To Control CATV Systems Is Void for Failure of the Commission To Comply With the Provisions of Section 4 of the Administrative Procedure Act

The stay order under review by this Court was based upon the authority conferred upon the Commission by Section 74.1109. Unless this section was validly adopted, the power to issue the temporary stay and the authority to designate the proceeding for hearing does not exist. Thus, the question is whether the Commission gave notice, adequate to comply with Section 4 of the Administrative Procedure Act, that adoption of Section 74.1109 was proposed.[18] It is submitted that the answer to this question is *no*.

Section 4(a) and (b) of the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C.A. §§ 1003(a) and (b) (Supp. 1950), set out the procedures to be followed by federal agencies in rule-making. The former requires the publication in the Federal Register of a notice of proposed rule-making including "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[19] The latter requires that, after publication of a notice of proposed rule-making, the agency afford "interested persons an opportunity to participate in the

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[18] The Administrative Procedure Act is to be given liberal interpretation so as to give effect to its remedial purposes. As stated by the Supreme Court, . . . it would be a disservice to our form of government and to the administrative process, itself, if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 94 L. Ed. 616, 624 (1950)

[19] The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance of the mandate of Section 4(a) "must be sufficient to fairly apprise interested parties of the issues involved so that they may present responsive data or argument relating thereto," and that "where notice is required, it should be complete and specific." S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 200, 358.

rule-making through submission of written data, views or arguments . . ."

Section 74.1109 of the rules, adopted by the Commission on March 4, 1966, and published in the Federal Register on March 17, 1966, (31 F.R. 4540), allows the Commission to "waive any provision" of the CATV rules, "impose additional or different requirements, or issue a ruling on a complaint or disputed question." Its terms also allow the Commission to determine, in the event the Commission decides to order an evidentiary hearing upon a petition submitted under Section 74.1109, ". . . whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief." Its terms do not require a hearing prior to the taking of any action which the Comission claims the right to do under the provisions of Section 74.1109.

Petitioners submit they never had the right, guaranteed by Section 4(b) of the Act, to present arguments in opposition to the adoption of Section 74.1109, because this proposed rule was never incorporated in a Notice of Proposed Rule Making which complied with Section 4(a) of the Act. Despite the fact that the Commission's Notice of April 23, 1965, (30 F.R. 6078) dealt with CATV in many respects, there was no hint that a rule such as Section 74.1109 was under consideration, or was proposed by any party. Moreover, the waiver and declaratory order provisions of Section 74.1109(a) were apparently not needed and their inclusion appears to serve no purpose. After all, the Commission's rules now and in the past have contained a provision for obtaining waivers of its own rules (Section 1.3) and for resolving controversy or uncertainty through a declaratory ruling (Section 1.2), both of which sections, however, require such action to be in accordance with the requirements of the Administrative Procedure Act. However, no existing rule of the Commission allowed the imposition of ". . . additional or different requirements", or the issuance of a stay without a hearing. Yet, these are the new and unusual provisions which were adopted along

with several other rules relating to CATV systems after what the Commission claims was a rule-making proceeding in which many comments and reply comments, none of which related to Section 74.1109, were "fully considered by the Commission." (31 F.R. 4540) All other substantive provisions of the other CATV rules fade into ineffectiveness under the impact of this provision of Section 74.1109, which gives the Commission total discretion over the activities of CATV systems, even to the point of ordering curtailment of activities permitted by other provisions of the CATV rules. It may be suggested that these new and expanded powers were adopted when it appeared that the other proposed rules would not be adequate to remedy what the Commission considered to be a growing problem. However, the Commission cannot remedy the inadequacies of a rule-making proceeding by adopting new and different rules than those proposed. If the Commission at the end of the proceeding does not have sufficient data to promulgate rules of "future effect designed to implement, interpret, or prescribe law or policy", [Section 2(c), Administrative Procedure Act, 5 U.S.C. 1001(c)], then the rule-making proceeding should be renewed or continued.

It is submitted that a complete reading of the Notice of Inquiry and Proposed Rule-Making of April 23, 1965, shows that the Commission proposed, (Para. 30; 30 F.R. 6082), at the very most, to adopt for non-microwave CATV systems the same rules as to carriage and non-duplication as were adopted that day for microwave service to CATV systems, (30 F.R. 6038, 6060), and to implement, while conducting an extensive inquiry into all aspects of CATV, an interim policy as to non-microwave served CATV systems. The interim policy might, as the Commission suggested in Paragraph 50 of the Notice, (30 F.R. 6085) prohibit the extension of the signal of any television station beyond its Grade B contour into a community with four or more commercial channel assignments and three or more stations in operation, or with at least two stations in operation and one or more stations authorized or applied for.

Paragraph 50 of the Notice must be read for what it is, strictly a request for consideration of interim proposals, and cannot be blown up into a full rule-making proposal, as the Commission would seek to do. (See, *In the Matter of Docket Nos. 14895, 15233, 15971,* 3 F.C.C. 2d 816, released May 27, 1966, at paragraph 22). In this paragraph of the Notice, the Commission suggested nothing but the possibility of interim measures:

> "We, therefore, request comments on what interim course of action, if any, may be appropriately followed by *the* Commission in this respect.[21]

> "[21]Such comments may discuss the jurisdictional as well as the policy considerations in any particular course of action."

The Commission then suggested that it would reach an early determination on the interim course of action, presumably so that interim measures would be in effect while the Commission considered views, arguments and data received in response to the Notice of Inquiry and then proceed to issue a further Notice of Proposed Rule-Making with a proposed comprehensive set of rules to cover all aspects, not merely carriage and non-duplication, of both microwave-served CATV and off-the-air CATV. The Commission obviously wished to be in a position to take interim action after receiving comments on Paragraph 50, and a specific invitation was made for comments on whether the interim action already prescribed for microwave-served CATV systems should apply to all CATV systems. It is clear that the Commission must rely, and does rely, on Paragraph 50 for any and all notice required for the adoption of all of its CATV rules with the exception of carriage and non-duplication.[20] To justify the adoption of Section 74.1109, therefore,

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[20] See, Paragraph 3 of the Commission's Second Report and Order, Docket Nos. 14895, 15223 and 15971, 31 F.R. 4540, which states clearly that no aspects of the proceeding aside from Part I and Paragraph 50 are dealt with.

the Commission must find in the language of Paragraph 50 more than what is patently there, i.e., the interim proposal. To expand Paragraph 50's apparent meaning, the Commission seems to center on the phrase "definitive action", as if this phrase equalled "final action" (See, *In the Matter of Docket Nos. 14895, 15233, 15971, supra,* para. 22). While definitive has as a meaning of finality, it is more appropriate, in the context of Paragraph 50, to understand definitive to mean no more than definite, also a meaning of definitive. To facilitiate the promulgation of definite interim rules, the Commission was soliciting comments on the specific interim rules which had been imposed on microwave-served CATV systems. The Commission clearly at that time wanted to adopt a well defined express interim rule, rather than a general interim rule not susceptible of specific application to off-the-air CATV systems.[22] *Yet, when the Second Report and Order was issued a year later, it promulgated Section 74.1109.* Section 74.1109 is clearly not an interim rule, anymore than is Section 74.1107, the major market-distant signal rule.

Paragraphs 97 and 98 of the Commission's Second Report and Order, (31 F.R. 4540, 4555) allude to comments suggesting that the "Commission should adopt specific rules providing for summary, non-hearing, procedures to handle requests for waiver of the CATV rules or for different treatments or affirmative relief." These comments cannot be considered counter-proposals, in the sense that a counter-proposal may satisfy notice requirements of Section 4(a) of the Administrative Procedure Act. There were *no* proposals made in the Notice of Inquiry and Proposed Rule-Making of April 23, 1965, which suggested a special

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[22] In what subsequent events have proved to be an erroneous statement, the Commission said in its Notice of Inquiry of April 23, 1965, "We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission." (Par. 64, 30 F.R. 6078, 6087).

set of rules might be adopted as to hearing proceedings in CATV matters. To suggest, as the Commission must, that a "description of the subjects and issues involved" appeared in the Notice of April 23, 1965, completely misses the mark as to Section 74.1109 of the CATV rules. Although the rambling Notice mixed obfuscation with exposition on the subject of television and CATV in particular, it nowhere got near suggesting (not even in one of its multifarious footnotes) that the Commission was contemplating assuming summary injunctive powers for itself, abrogating a party's right to hearing, or asserting the right to adopt further restrictions on an *ad hoc* basis.

The leading case on counter-proposals, as satisfying Section 4(a) notice requirements, is *Owensboro-on-the-air v. Federal Communications Commission,* 104 U.S. App. D.C. 391, 262 F.2d 702 (1958), *cert. denied,* 360 U.S. 911, 3 L. Ed 2d 1261 (1959). The Commission's original proposal in that rule-making proceeding had great clarity, specifying the reservation of a stated channel for educational use only, and the release of another stated channel from educational use to allow the possibility of commercial operation of the latter channel. The underlying policy behind the Commission's proposal was also quite clear, although there existed several approaches in line with that policy, and the Commission specifically requested both oppositions to its proposal, and counter or alternative proposals. *Supra,* at 394, 262 F.2d at 705. Further, and of great importance, very few parties had interests in the Commission proposal and the counter-proposals, and all parties who participated in the proceeding had actual knowledge of the several proposals put forth and comments thereon. *Supra,* at 395, 262 F.2d at 706. The Court partially explained its upholding of the Commission's action in *Owensboro* by stating that all parties had actual notice, and that a description of the subjects and issues had been published. However, the Court stated definitely that it "had no intention whatever of accepting a Commission plan of convenience as a substitute for compliance

with the rule-making notice requirements of Section 4 of the Administrative Procedure Act." *Ibid.* In contrast in the instant case, none of the Petitioners had actual notice that any rule resembling Section 74.-1109 might be adopted or had been proposed by any person.

A final important aspect of the Commission's proceeding which led to adoption of the CATV rules, including Section 74.1109, is the quasi-adversary nature of the proceeding. Although by its terms a non-adjudicatory proceeding, the rule-making was initiated by television broadcast interests, and the adoption of rules to curb CATV was generally urged by the television broadcast industry. The adoption of restrictive rules was opposed by CATV interests, which supported their arguments by submission of voluminous studies, as did the television broadcasters. There is little doubt but that the two sides considered themselves adversaries in the proceeding; in any event, the rules adopted by the Commission certainly served to restrict CATV systems and to grant valuable rights to television broadcasters. The Commission's Second Report and Order, Docket 15971, summarizes, in its Appendix B, certain of the comments submitted in response to Paragraph 50 of the Notice of Inquiry. (31 F.R. 4565). NCTA (The National Community Television Association) strongly opposed an interim rule such as proposed in Paragraph 50, and it alleged certain factual conclusions indicating that no basis existed for such an interim rule. On the other side, American Broadcasting Company, Westinghouse Broadcasting Company, Storer Broadcasting Co., The Association of Maximum Service Telecasters, Midwest Television, Inc., and many television stations urged the adoption of highly restrictive interim rules, and they alleged facts indicating that a basis might exist for adoption of some interim rules curbing CATV.

Despite the obvious adversary quality to this supposed rule-making proceeding, the Commission did not hold to even the most minimal requirements found in the spirit, as well as the letter, of the Adminis-

trative Procedure Act. The Commission has in the past held oral argument on major rule-making matters;[23] it did not hold oral argument in this proceeding. The Commission has in the past, on both minor and major rule-making matters, released a draft of proposed rules with its Notice of Proposed Rule-Making;[24] it did not release a draft of its proposed CATV rules prior to their adoption.

For the above reasons, it is submitted that Section 74.1109 of the Rules of the Commission was illegally adopted and is void for the failure of the Commission to comply with the provisions of Section 4 of the Administrative Procedure Act in the proceeding leading to its adoption. Thus, the stay order, issued under the authority of Section 74.1109, is clearly illegal, and the Commission's order must be renewed.

CONCLUSION

For the foregoing reasons, the Memorandum Opinion and Order of the Federal Communications Commission granting a temporary stay of Petitioners' right to carry the signal of the Los Angeles television sta-

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[23] *Petition of CBS, Inc. for Changes in Rules and Standards of Good Engineering Practices Concerning Television Broadcast Stations. Docket No.* 7896, 1 (Part Three) Pike & Fischer, RR 91:261, 91:265-91:276; *Study of Radio and Television Network Broadcasting, Docket No.* 12782, 20 Pike & Fischer, RR 1901; *Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms* 301, 303, 314 *and* 315, *Docket No.* 13961, 5 Pike & Fischer, RR 2d 1773.

[24] *In the Matter of Amendment of Part* 73 *of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, Docket No.* 12782, FCC 65-227, March 22, 1965; *In the Matter of Amendment of Sections* 3.182, 3.185 *and* 3.190 *(Skywave transmission on Class I-B clear channels). Docket No.* 14307, FCC 61-1206, October 16, 1961; *In the Matter of Amendment of Section* 4.602 *of the Commission Rules and Regulations to prohibit the assignment of more than one channel to provide duplicate television STL or intercity relay circuits between the same point of origin and destination. Docket No.* 14614, FCC 62-452, April 27, 1962.

tions and designating the proceeding for hearing should be reversed and remanded with instructions to set aside the temporary stay and dismiss the petition of Midwest Television, Inc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Robert L. Heald

APPENDIX

CONSTITUTION OF UNITED STATES

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

COMMUNICATIONS ACT OF 1934, AS AMENDED, 66 STAT. 718, 47 U.S.C.A. 151 (1962), *et seq.:*

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

APPLICATION OF ACT

Sec. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio,

and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Sec. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio or writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Sec. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, posses

sion, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall--

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

ADMINISTRATIVE PROCEDURE ACT,
60 STAT. 237, 5 U.S.C.A. 1001, *et seq.*:

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Admin istrative Procedure Act, on motion or on its own motion issue a declara tory ruling terminating a controversy or removing uncertainty. (Sec. 5(d), 60 Stat. 239; 5 U.S.C. 1004(d))

Sec. 1.3 Suspension, amendment, or waiver of rules.

The provisions of this chapter may be suspended, revoked, amende or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

Sec. 1.106 (n)

Without special order of the Commission, the filing of a petition fo reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or oper ate in any manner to stay or postpone the enforcement thereof. Howeve upon good cause shown, the Commission will stay the effectiveness of it order or requirement pending a decision on the petition for reconsidera tion. (This paragraph applies only to actions of the Commission en banc For provisions applicable to actions under delegated authority, see § 1.102.)